APPEAL NO. 980758
FILED MAY 22, 1998

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 16, 1998, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues concerned whether appellant, who is the claimant, had depression, post-traumatic stress disorder, chronic fatigue syndrome, and fibromyalgia related to her compensable injury of (date of injury) (which was primarily a psychological injury); whether the carrier had newly discoverable evidence upon which to base its dispute of compensability of these conditions; and whether the claimant was entitled to supplemental income benefits (SIBS) for the seventh compensable quarter.

The hearing officer held that claimant's post-traumatic stress disorder and current depression were the result of her injury, and moreover, the carrier did not have a basis upon which to reopen compensability of these conditions. The hearing officer further held that the chronic fatigue syndrome and fibromyalgia were not related and, the carrier had disputed these conditions within 60 days of receiving written notice of this injury. Finally, the hearing officer held that the claimant "retained some ability to work" and had not made a good faith search for employment commensurate with her ability to work, and therefore was not entitled to SIBS. The hearing officer found, however, that her unemployment was the direct result of her impairment.

The claimant has appealed. She argues that the doctor treating her for chronic fatigue has, throughout his medical reports, linked that condition to her compensable injury. She states that it is related and she has produced expert medical evidence that establishes that causation. She says that the carrier waived its right to contest compensability, and notes that the doctor treating this condition has been continually writing the carrier, seeking payment for her treatment. Finally, claimant appeals the determination she is not eligible for SIBS, stating that her doctors have pronounced her unable to work due to her post-traumatic stress and panic attacks. She notes that the hearing officer appears to have faulted her for not inquiring about a part-time job held by her sister, referred to in her father's testimony, when there is no evidence whatsoever as to what that job entailed or whether any similar jobs were available. Carrier responds that the plight of claimant's daughter is a factor in her continued psychological condition. The carrier acknowledges that the hearing officer has based much of her SIBS decision on an opinion that claimant could have sought employment alongside her sister, cleaning houses. There was no appeal of the post-traumatic stress syndrome and depression findings, or of the "direct result" determination. The carrier asks that the decision be affirmed.

DECISION

Reversed and rendered.

This is another case in which a concern by the carrier over the reasonableness, necessity, and expenses of medical treatment for a compensable injury have manifested themselves not as a dispute through the medical review division and the Administrative Procedures Act (APA)hearing process system but as an "extent of injury" question through the benefit CCH. Consequently, as compensability of the basic injury was conceded several years ago, a companion issue is raised in this case as to whether there is a basis to reopen compensability.

While employed as an apartment manager, claimant was sexually assaulted on (date of injury). She continued trying to work until April 1993, and has not worked since then due to increasing psychological problems related to her attack. Claimant was assessed as having a 20% impairment rating (IR).

The SIBS quarter in issue ran from December 28, 1997, through March 28, 1998, and therefore the filing period was the 90 days ending on December 27, 1997. Claimant's contention is that she did not seek work because she was unable to work. She said that she had frequent panic attacks and was severely restricted in her ability to deal with the public or be in public places. She and her father (who did not hear her testimony as he was outside the hearing room under the "rule") both agreed that she stayed home for the most part, did not drive, and did not go into public unaccompanied by her father, sister, or mother.

Claimant's father testified, almost in passing, that claimant's sister was able to be home with her for much of the time because she had a part-time housekeeping job in a friend's company. Nothing was developed at all about what this job entailed in terms of location, duties, or public contact. Nor was there any evidence that this employer was hiring other housekeepers.

The evidence indicated that the claimant had undergone another disturbing incident in her life when she found out in early 1996 that her minor daughter had a pseudo brain tumor. Her daughter was required with some frequency to have lumbar punctures, done in another city. Her daughter was also homebound. Claimant said that even if her doctors released her back to work, that it was possible that her daughter's need for such extraordinary medical treatments would affect her ability to hold employment. Claimant was also involved in a motor vehicle accident in 1995, as a passenger, but said she had recovered from these injuries.

The claimant was treated by (Dr. W) for her condition until he became unavailable. She then changed her treating doctor to (Dr. E).

The carrier's concern with the expense and reasonableness and necessity of medical treatments is made clear in an earlier Payment of Compensation or Notice of

Refused or Disputed Claim Interim (TWCC-21) that the carrier filed on August 25, 1997, in which it disputed treatment for nasal problems and carpal tunnel syndrome, and further stated: " Any other treatment, other than reasonable/necessary treatment by [Dr. E], is also disputed". By this point, claimant had also been treated for a number of years (since July 1995) by (Dr. L), to whom she had been referred by Dr. E when she had continued infections that did not go away. His billing records reflect payment by "w/c" in February 1996. Thereafter, there are notations of payment by "ins" with the further notation (shown as a payment) of "adj wc." Dr. L's letterhead identifies him as an allergist.

Dr. L's first evaluation indicated that he intended to test for Lymes disease or lupus, hepatitis, and various allergies. On June 5 and 11, 1996, Dr. L's notes document that he was going to have his office personnel get with the worker's compensation carrier to make sure they were filing bills correctly because he was not being paid; he further noted he had talked with Dr. E, who was not getting paid either. He stated an intent to file a complaint with the Texas Workers' Compensation Commission (Commission) if matters could not be resolved. His treatment notes reflect several evaluations for sinusitis, earache, parotid gland problems, low grade fevers, and headaches. The claimant testified that Dr. L told her all of this was part of the complex of symptoms stemming from chronic fatigue syndrome. Dr. L's treatment notes of February 27, 1996, state that she has fatigue and immune dysfunction secondary to trauma at work.

Dr. E's letters to the Commission, documenting her post-traumatic stress disorder, depression, anxiety induced asthma, colitis, possible diabetes, and headaches as a direct result of the rape, date back to early 1995. Dr. E's Specific and Subsequent Medical Reports (TWCC-64) listing the diagnosis of post-traumatic stress disorder date back through 1994. On September 22, 1997, Dr. E wrote that due to her depression and post-traumatic stress disorder, claimant was unable to do any work whatsoever, pointing out that being away from home for any reason, even family funerals or shopping, produced extreme anxiety.

Claimant was evaluated by (Dr. J), a psychiatrist for the carrier, on July 13, 1995. To briefly summarize, Dr. J strongly questioned whether claimant should still be suffering the effects of the sexual assault at that point in time. Dr. J said that claimant seemed to enjoy the role of victim, and opined that she had a histrionic personality disorder. He further noted that she told him she was going to seek evaluation by a specialist to see if she had chronic fatigue syndrome. Dr. J noted that claimant was being coddled rather than confronted by her therapists and would not make progress as a result. He certified a zero percent IR.

Thereafter, (Dr. T) examined claimant as a designated doctor on October 23, 1995. He quoted from Dr. J's opinion, and in response to the observation about histrionics, noted that the occurrence of the rape was not in dispute, it was a significant trauma, and that

claimant could be expected to have a human reaction to it. In discussing claimant's current treatment, Dr. T expressly noted in his report that claimant was stated to have, among other things, chronic fatigue syndrome. His diagnosis was chronic post-traumatic stress syndrome. Dr. T found mild to moderate impairment in various functional areas such as daily living or social functioning, and certified a 20% IR.

In December 1997, the carrier referred claimant's medical records to (Dr. P) Ph.D., for his evaluation. Dr. P, in a December 12, 1997, report, described the records he had been given to evaluate: he noted that he had records from Dr. L, that, as of March 1996, stated that claimant "suffers from fibromyalgia-chronic fatigue immune dysfunction syndrome." Dr. P went on to assail this diagnosis as a sort of fringe diagnosis without scientific backing or evidence. He questioned that psychological stress could cause diabetes or colitis. He opined that Dr. E's treatment is ineffectual and inadequate, and that further treatment is neither reasonable nor necessary.

On December 16, 1997, after receiving the results of an (medical )peer review, which also incorporated aspects of Dr. Ps' opinion (and recited that claimant was diagnosed with chronic fatigue immune dysfunction syndrome by Dr. L in 1996), the carrier filed a TWCC-21 asserting:

> Peer review and psychological treatment and medications are not related to original injury and ongoing treatment is unreasonable and unnecessary. Also, as regards fibromyalgia chronic fatigue syndrome there is no scientific backing or evidence for this diagnosis. This diagnosis is also disputed as being unrelated.

The hearing officer found that this dispute was clearly based upon receipt of Dr. P's report, which would not constitute an adequate "new evidence" basis for reopening compensability on the post -traumatic stress disorder. However, the hearing officer did not apply a reopening theory to the chronic fatigue syndrome compensability issue, but cast about the record looking for that document which would constitute "written notice of injury" of this diagnosis more than 60 days prior to the TWCC-21, and found the numerous medical documents concerning treatment of this condition wanting in that they did not indicate that this condition was "alleged to be compensable."

Assuming that chronic fatigue syndrome/fibromyalgia would meet the definition of an "injury" in the first place[1], (which argument was not raised by the carrier), it appears to us that the opportunity to at this point dispute the underlying issue of compensability

[1] *See* Texas Workers' Compensation Commission Appeal No. 980177, decided March 13, 1998, which noted that a carrier was not required to contest every possible reference in medical records to symptoms or pain and thereby be held on notice that they reflected "injuries."

has long since passed under the all the facts of this case. The record as a whole establishes that well before the claimant's case progressed to the seventh quarter of SIBS, treatment was being rendered by Dr. L and claimed through the carrier (and to some extent paid) for this condition; that the carrier and Dr. L were even involved in a dispute over payment for these services in mid-1996 (at which point a TWCC-21 could have been filed); that the designated doctor in October 1995 referred to chronic fatigue syndrome as one of claimant's injury-related diagnoses reflected in her medical records; and that two consultants for the carrier, Dr. P and (medical), were provided with medical records by the carrier, which recited as a diagnosis by Dr. L in 1996. While no one of these facts is dispositive, together they lead to the conclusion that carrier, at a point well preceding the TWCC-21 knew and understood that the claimant was asserting that this condition was an outgrowth of her psychological injury; in short, the conduct and actions of the carrier over a period of years are proof that it was "fairly informed" that chronic fatigue syndrome was claimed as a facet of the injury. It is clear that Dr. P's report, and not a written notice of injury, was the instigation for the December 1997 TWCC-21. The determination by the carrier to attack further treatment for this condition through a declaration that it is not a "compensable injury," rather than requesting an assessment of reasonableness and necessity of further medical treatment through the APA process, is belated, as well as misplaced. We, therefore, reverse the hearing officer's determination that the carrier timely disputed compensability of the chronic fatigue syndrome, and render a decision that it did not. (We caution that carrier still retains remedies it has through the medical review division and APA process to question whether it is reasonably and necessarily required to pay for treatment of every illness asserted as part of this syndrome; the fact that the syndrome might cause the claimant to catch more ordinary diseases of life does not ensure that carrier is the primary payor for a lifetime of influenza and sinusitis).

Concerning the SIBS holding, we note in her discussion that the hearing officer cites the Appeals Panel's articulated standards on the level of proof required to prove that the injured worker had no ability to work, and then goes on to say:

> Applying this standard to the facts of the case at bar, the Hearing Officer notes that both lay observation and medical evidence tend to indicate that, during the relevant filing period, claimant would have been unable to seek or obtain employment in the marketplace, as the terms "employment" and "marketplace" are traditionally used. However, the hearing officer observes that the evidence contained to [sic] the record of the Contested Case Hearing revealed that claimant's sister worked cleaning houses, on a part-time basis. Although it clearly would have been difficult for claimant to have joined her sister in this enterprise, the hearing officer is of the opinion that it would not have been impossible for claimant to have done so, and have permitted claimant to remain in the company of her sister while

claimant was outside her home, and almost certainly would not have required claimant to confront crowds or similarly stressful environments.

She thereafter finds that claimant had "some" ability to work, and that she did not make a good faith search for employment commensurate with this ability to work.

Just as claimant does in her appeal, we question the relevance of the observation about the nature of the sister's part-time job to the issue at hand. There was no allegation, let alone evidence, that employment alongside her sister was possible. We believe that the great weight and preponderance of the evidence in this case from the claimant's treating doctors, which is not contradicted for the filing period by any other doctors, is against the hearing officer's finding that the claimant had "some ability" to work. The same conditions which the hearing officer agrees would prevent the claimant from seeking work would also prevent her from performing work.

For these reasons, we reverse the determination that the carrier timely disputed the compensability of chronic fatigue syndrome and hold that carrier did not timely dispute this condition. We further reverse the determination that the claimant was not eligible for SIBS and render a decision that she was eligible for SIBS for the seventh quarter.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge